SUPREME COURT, U.S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 1179

CHARLES SELLERS, RICHARD STROHMAN, and BRUCE KIRMMSE, individually and as members of the Campus Draft Opposition, on behalf of themselves and others similarly situated, *Petitioners*

VS.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation, *Respondent.*

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

I.

JURISDICTION UNDER 42 U.S.C. §1983 WAS PROPERLY INVOKED

Respondent, for the first time in this litigation, contends that it may not be sued pursuant to 42 U.S.C. §1983.[1] At least as to injunctive and declara-

[1]The contention was raised neither in the District Court where, if Respondent had expressed a desire to have the complaint amended to name the members of the Regents individually, petitioners would have been happy to comply, nor in the Court of Appeals. Thus even if this "defense" had any merit, it comes too late. It has been waived.

tory relief the contention is preposterous. The notion that, for example, this Court's opinions in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967), are jurisdictionally infirm is too unsettling even to be entertained. Corporations are persons within the meaning of §1983 as they are persons within the meaning of the Fourteenth Amendment and, accordingly, may be sued for money damages and injunctive relief. See, e.g., *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970). Public corporations are persons too. The legislative history of §1983, however, demonstrates that, because of the doctrine of sovereign immunity, public corporations are not liable in *money damages* unless they agree to be sued. Thus in *Monroe v. Pape*, 365 U.S. 167 (1961) it was held that a municipal corporation was not liable in money damages for the unlawful acts of its employees. Since California, in its own courts, has waived sovereign immunity and permits the Regents to be sued as a corporation the petitioners should, we think, be able to recover in money damages also. See, Mandel, *Comment, Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 Cal.L.Rev. 1142 (1969). And petitioners do sue for money damages. But it is hardly a significant aspect of this case. Indeed, it was not even mentioned in the Petition for Writ of Certiorari. The principal relief sought by petitioners is injunctive and declaratory and, as to that, there can be no question that jurisdiction against public corporations lies under §1983. The public coffers will not be depleted by §1983 injunctive suits. That is

why injunctive relief was granted in *Brown, Keyishian* and a host of other cases brought against public corporations pursuant to §1983.

II.

THERE WAS NO "INDEPENDENT" GROUND FOR DENYING THE PERMIT FOR THE USE OF THE GREEK THEATER

Respondent contends that it refused petitioners the use of the Greek Theater for a peaceable assembly because it desired to avoid confusion between the Campus Draft Opposition rally and officially sponsored University events. As we noted in our Petition (pp. 6-7), the petitioners did everything within their power to ensure that the event would not be confused with University-sponsored events. Respondent has never been able to explain what additional steps could conceivably be taken nor why the petitioners' format and proposed disclaimers were, in Respondent's view, an insufficient precaution against confusion.

The fact of the matter is that this "alternative and independent ground" is a subterfuge and, even if it were not, it would itself be an unconstitutional prior restraint because of its vagueness, overbreadth and lack of procedural safeguards, including prompt judicial review. The Supreme Court of California rejected a similar "confusion" claim advanced as justification for an infringement on First Amendment rights in *Huntley v. Public Utilities Commission*, 69 Cal.2d 67 (1968) where, in defense of its rule requiring persons to identify themselves at the conclusion of

recorded messages, the Commission urged that "callers would ascribe the contents of a recorded message to Pacific Telephone and Telegraph." *Id.* at 76. A unanimous court responded that "this assertion borders on the frivolous." *Ibid.* The Court went on to state that even if the defense had merit it would fail under the doctrine of overbreadth.[2] "Obviously, the telephone company could allay its fears by simply requiring the subscriber to state that the message was not sponsored by the telephone company." *Id.* at 77. And see *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal.2d 51, 61 (1967).

III.

THE CONTENT OF PETITIONERS' PROPOSED ASSEMBLY WAS CONSTITUTIONALLY PROTECTED

The assembly petitioners proposed to hold at the Greek Theater was to honor and pledge support to draft-eligible young men whose conscience compelled them to refuse induction into the armed forces because of the government's Viet Nam policy. We have said that the expression of such ideas was held constitutionally protected by this Court in *Bond v. Floyd*, 385 U.S. 116 (1966). Respondent now tells us that we are "far from the mark" in contending that there is an analogy. Brief for Respondent in Opposition, p. 17.

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[2]The Court quoted the following language from *Shelton v. Tucker*, 364 U.S. 479, 490 (1960):

> "*E*ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Well, let us turn to the statement which Bond endorsed. In part it said:

> "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft which would compel them to contribute their lives to United States aggression in Viet Nam in the name of the 'freedom' we find so false in this country.
>
> . . . .
>
> "We therefore encourage those Americans who prefer to use their energy in building democratic forms within this country. We believe that work in the civil rights movement and with other human relations organizations is a valid alternative to the draft. We urge all Americans to seek this alternative, knowing full well that it may cost their lives—as painfully as in Viet Nam."
> (385 U.S. at 120-121.)

How the content of the Bond statement may be deemed constitutionally protected but the content of the proposed assembly unprotected remains a mystery to us.

IV.

PETITIONERS WERE DENIED THE USE OF THE GREEK THEATER

Under the rubric of "There Is No Conflict Of Decisions," respondent tells us that there is no "speaker ban" and that the proposed assembly occurred. Taking the contentions in order:

1) Apparently the contention that this case, unlike *Brooks v. Auburn University*, 412 F.2d 1171 (5

Cir. 1969), does not involve a "speaker ban" is premised on the theory that an "assembly ban" is a different sort of beast. But in *Brooks,* as in all speaker ban cases, both the speech and the assembly were prohibited. Maybe Respondent's point is that *speakers* rather than *speaker* were banned in this particular case but, if so, we fail to see the significance of the distinction. Surely it does not militate in Respondent's favor.

2) Respondent alleges facts outside the record, and never before introduced into this case, to demonstrate that the proposed assembly did in fact occur. Now, in the first place, it is a bit inconsistent on the University's part to contend, on the one hand, that it had to ban the assembly in order not to be a party to a violation of 50 U.S.C.A. section 462(a) and, on the other, that it permitted the assembly to occur. Actually Respondent is wrong on both points. As we have already demonstrated, there was nothing unlawful about the proposed assembly. And the assembly which did in fact occur was not the same assembly as that proposed and prohibited. There was in fact an assembly at the University of California, Berkeley, Sproul Hall Plaza on May 17, 1968.[3] The assembly did not include all the speakers, or all of the program, that petitioners desired to present. And it was a very

[3]We concede that such an assembly occurred although, frankly, we do not see how this Court can take judicial notice of it. Although it may be that this Court may take judicial notice of the "application for reservation of University facilities" filed by the Campus Draft Opposition, we do not see how judicial notice of that can lead to judicial notice of the granting of the permit and the subsequent assembly.

different kind of an assembly. Sproul Hall Plaza is the gateway to the University of California, a place of heavy foot traffic and general disorder. Acoustics are poor and only inferior sound equipment of the mobile variety can be used. Persons attending a rally in Sproul Hall Plaza have to stand for the presentation and cannot, as they can in the Greek Theater, sit comfortably or hear well. The occurrence of an assembly in Sproul Hall Plaza cannot justify the prohibition of one at the Greek Theater. One cannot be denied the use of a comfortable and appropriate public facility for his assembly because an assembly can also be held on the street (and Sproul Hall Plaza is essentially a street). As this Court has observed elsewhere:

> "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."
>
> *Schneider v. State*, 308 U.S. 147 (1939);

and see

> *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1969).[4]

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[4]This rule is so elementary that we have attempted to divine Respondent's purpose in raising the point. The conclusion we have come to is that the University is somehow trying to convey the impression that it does not oppose the holding of anti-conscription assemblies even though it persists in labeling them illegal. If that is the purpose then it must be pointed out that when the Greek Theater assembly was banned the student body was outraged and a movement to hold a Sproul Hall assembly, whether authorized or not, was initiated. The attitude was lamentable, but a fact. If a large contingent of students are committed to assembling in Sproul Hall Plaza there is nothing the University can do about it unless it is prepared to confront the assemblage with a mass police force. To avoid violence, Campus Draft

V.

CONCLUSION

The decision below is totally at variance with fundamental First Amendment principles. See Petition for Writ of Certiorari, pp. 18-21. If it stands it will produce incalculable mischief when citizens attempt to exercise their cherished right peaceably to assemble at public places in the Western United States. That is the most significant issue in the case and one which Respondent has studiously, and conspicuously, avoided confronting.

For the aforementioned reasons, and all the reasons mentioned in the Petition, petitioners respectfully urge that the Petition for Writ of Certiorari be granted.

Dated, February 10, 1971.

Respectfully submitted,

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Opposition applied for the Sproul Hall permit and, also to avoid violence, the University, commendably, granted it. Happily, a confrontation was avoided but it need never have been a possibility if the University had not unlawfully prohibited the Greek Theater assembly. Freedom of Assembly is not a liberty to be extended only in public streets to those who can attract a crowd of sufficient numbers to make their dispersal a hazardous occupation.